IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

No. 183.

JOHN W. ARNOLD,
Plaintiff in Error,

vs.

LEWIS HATCH,
Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

At the July term, 1897, of the District Court of the United States for the Northern District of Illinois, in the case of Joseph G. Heim, *Receiver of the First National Bank of South Bend vs. Frank W. Hatch*, judgment was rendered against the defendant for the sum of $4,351.09.

(Rec., p. 7.) On August 21, 1897, the United States Marshal, acting under the authority of the execution, issued for the collection of this judgment, levied upon the following enumerated articles of personal property, which the officer found on a farm where the defendant in execution resided in School District No. 2, town of Burton, McHenry county, Illinois. (Rec., p. 9):

Six hundred sheep, forty-five milch cows, fifteen head of young stock, twenty horses, four stacks of oats, 150 tons of hay, eleven hogs, two mowers, one hay loader, four plows, three drags, three harrows, one seeder, one corn planter, one pulverizer, one roller, one tedder, one hay fork and tackle.

On September 1, 1897, *Lewis* Hatch, the defendant in error, filed his sworn petition in the District Court in the original action in which the judgment was rendered, claiming to be the absolute and sole owner of all the property levied upon, and praying the court to order the officer to release the levy. (Rec., pp. 9-10.) The plaintiff in error filed an answer, traversing the petitioner's allegations of ownership and the issue as to right of property went to a jury for trial.

It may be observed here that this is the same controversy that was before the Court of Appeals for the Seventh Circuit at the October, 1897 term, under the title of *Lewis Hatch vs. Joseph G. Heim, receiver, etc.* There the Court of Appeals *reversed* the District Court judgment rendered on a verdict *sustaining* the levy (see opinion of the court, 86 Fed. Rep., 436), and remanded the cause. A new trial was had, resulting in a verdict and judgment against the levy and in favor of defendant in error (petitioner below).

When the record of this second trial was before the Court of Appeals, the errors assigned were the same as those presented here, namely, that the trial court erred in refusing to direct a verdict in favor of the levy and in instructions *given* and *refused*. But the trial court, having charged the jury in accordance with one of the two theories enunciated by the Court of Appeals in its first opinion above referred to (86 Fed. Rep., 436), the judgment was affirmed.

The two theories referred to (laid down in the 86 Fed. Rep., at page 436) as being the law of this case were:

1st. That the contract between the petitioner below (defendant in error) and his son (the execution debtor) with respect to the property levied upon, constituted the holding of the property a *bailment*, with the defendant in error, the bailor, and the execution debtor, the bailee.

2nd. That the same contract between the same parties, with respect to the same property, at the same time, also erected the parties into the relation of *master and servant*—the defendant in error being the master and the execution debtor being the servant.

Of course for these two adverse theories to apply to one posture of events would be a logical impossibility. The learned trial judge instructed the jury in harmony with theory number two. That *neither* of these two theories correctly stated the law of the case, and that the trial court gravely erred in instructions, both *given* and *refused*, will be apparent to your Honors from the following

STATEMENT OF FACTS.

Lewis Hatch, the defendant in error, is the father of *Frank* W. Hatch, the execution debtor. In 1883 Hatch, senior, who then (and for about twenty-five years prior thereto had) resided on and operated the farm where the property was seized by the marshal (desiring to go out of the farming busines), made a contract with Hatch, junior, providing that the latter should take the farm, with the farm personalty, and operate it. It was further stipulated in this contract that the entire burden and responsibility was upon the the son. He was to keep up the farm, make all repairs, pay all taxes and other expenses, replace all implements as they wore out, and all stock as it got old. It was further stipulated that if at any time the contract was terminated (and either party was free to terminate the tenancy at will) *the son should turn back to his father the farm with implements, stock and other farm personalty of the same kind and amount as was on the farm when the father retired.* (Evidence of defendant in error, pp. 34-35-36.) "Everything was to be turned back in as good condition as he (the execution debtor) took them" (Rec., p. 35) and "if he (the execution debtor) *did not have the same to turn back to substitute it with other ones.*"

The defendant in error testified further this stipulation of the contract was made "with respect to all the stuff the defendant in error turned over to the execution debtor." (Rec., pp. 35-36).

In consideration of the burden and responsibility thus assumed by the execution debtor he was to have what he could make out of the farm, and in consideration of step-

ping aside and turning the farming business over to the son, the defendant in error was vested with a right *under the terms of the contract* (Rec., p. 35) to receive the farm back from the son (if the arrangement should ever terminate) *with implements, stock and other farm personalty equal in kind and amount to* that which was on the farm when the contract was made. The father continued to reside in the homestead and the son *at his own expense* built a residence on the farm for the occupancy of himself and family.

This contract was in force at the time the levy was made. During the life of the arrangement Hatch junior made several prospecting trips to western states but (as the defendant in error testified) there was never any impairment of the agreement.

A further and somewhat detailed reference to the proof, it is believed, will conduce to a correct understanding of this case. On the second trial, *and after the Court of Appeals had given expression to the master and servant theory*, the defendant in error testified that:

"My son was *my manager*. * * * I had him en-"gaged for an *overseer boss*, or whatever you might call "him, *manager*, *agent*, whatever you might call him. He "was transacting *my business*. (Rec., p. 29.) All ex-"pense was to be paid out of the income of the farm. What "was left was his (the son's) *salary*."

And (on the second trial) being asked, on cross-examination, what responsibility he (the defendant in error) had, under the contract, with reference to the property levied upon, the witness said:

"I had the responsibilities of looking and seeing that "everything was taken care of. (Rec., p. 33.) Seeing

"whether the stock was *managed* as it should be; whether "he (the execution debtor) was *managing my business* in a "proper way; the responsibility of keeping up the personal "property was with the income of the farm. Frank, as "*my manager*, was to do it." (Rec., p. 34.)

On the second trial the defendant was asked, on cross-examination:

"Whether or not he (the execution debtor) should keep "up the stock, the farm implements and all the other per-"sonal property on the farm, and if ever he (the execution "debtor) left the farm he should turn over to you (the de-"fendant in error) the same number and value of property "that you turned over to him at that time (the beginning of "the arrangement.")

And in reply to this question the defendant in error said:

"Well, sir, *there was nothing of the kind specified.* But "the understanding was that he should not do, as a great "many had done, turn off everything and leave the farm. "but he should leave everything in running order as he "found it if he took a notion to go." * * * (Rec., p. 31.)

Fortunately for the rights of the plaintiff in error a stenographer was present at the first trial and wrote down the testfimony of the defendant in error. On the second trial this man admitted that on the former trial he gave the following evidence:

"Q. What was the arrangement with reference to "what Frank was to turn back to you?

"A. To turn back, as I said before, he was to keep the "stock in as good condition as he found it, and every-

"thing else on the farm. If the farming tools were out "they had to be replaced."

"Q. *He was to replace them with new ones?*

"A. *With new ones to supply their place; if the cows "got old he should turn them off and replace them with "new ones.*" (Rec., p. 32.) * * * *Everything* was to "be *turned back* in as good condition as he took them."

"Q. Or if he didn't have the same to turn back *to sub-"stitute it with other ones?*"

"A. *Certainly, that was the meaning of it; that was "what was understood about it.*"

"Q. I understood you to testify that was true with re-"spect to *all the stuff you turned over to him?*"

"A. Yes, sir." (Rec., p. 35.)

The execution debtor, Frank W. Hatch, testified as a witness for defendant in error. He said he was *supervising* the farm *for his father;* that he was in the *employ* of his father, and that he never *rented* the farm. (Rec., p. 50.) Being pressed on cross-examination (Rec., pp. 50-51), this man admitted that on the first trial of the case he stated that he had informed the marshal when the levy was made that he "*rented the farm;*" and that when he made this statement to the levying officer he (the execution debtor) thought "*he was a renter.*" (Rec., pp. 50-51.) And, further, this witness admitted that on the former trial he tastified that he also said to the levying officer that it was not an unusual thing for the *tenant* to pay the taxes. (Rec., p. 52.)

When your Honors come to consider the contract under which the father retired from business, and the son went into business, the above quoted statements made by the son (a graduate of a law school) at a time when the ques-

tion of *what must be done to save the property from marshal sale*, had not been made the subject of grave deliberation, will contribute substantially to the view that the relation of the defendant in error and execution debtor was not bailor and bailee nor master and servant; but that, clearly, the father (the *owner* of the *realty*) was the *landlord*, and the son, who had the possession and use of the farm, was the *tenant;* that it was a *tenancy at will*, the contract embodying the familiar and essential elements of such a tenancy; that the title to the personal property on the farm at the beginning of the tenancy, seventeen years before, passed to the son at that time; that the personal property levied upon (practically *all of which* was brought to the farm by the son *during the tenancy*), was the property of the son, liable to seizure in execution for his debts.

In further support of the contention of plaintiff in error that the son was the *tenant* of the farm, *and not the mere servant of his father* (as contended by defendant in error), the court's attention is invited to the statement of defendant in error's witness, Jones—a hired man on the farm—who testified (Rec., p. 91) that he was "*in the employ of Frank Hatch*" (the son); that the father had "complained" about the plowing of a certain field last year; that the same field was plowed the same way this year by the witness, "*who was ordered to do so by Frank W. Hatch*" (the pretended servant). This incident, trivial in itself, is important as showing who was the *master* on that farm.

Both father and son (speaking of the contract under which the business was turned over to the son) testified to practically the same agreement. And on the witness stand they both sought to give that agreement the same con-

struction, namely, that the *son* was the *servant* of the *father* in the business of running that farm.

In behalf of the plaintiff in error the tax schedules of personal property in *School District number two* were introduced in evidence. (Copies inserted at page 101 of Record.) One of these schedules was signed by *Lewis* Hatch, the father, purported to contain "a full, complete and correct schedule" of his personal property in *School District number two*, May 1, 1897, liable to taxation; *this schedule did not contain one single article of the kind levied upon;* the other schedule was made out by the son *Frank* W. Hatch, contained a list of the "numbers, amounts, quantity and quality of all personal property *belonging to Frank W. Hatch*" *in School District number two*, May 1, 1897, and included in detail, "horses, cattle, sheep, hogs, farm implements," etc., as per the levy.

At the close of the evidence of defendant in error, and again at the close of all of evidence, the plaintiff moved the court to direct a verdict in favor of the levy, which the court refused to do, and to which refusal the marshal saved his exception. (Rec., pp. 99-101.)

Thereupon, the plaintiff in error moved the court to give the jury the following instruction, which the court refused to do, and to which refusal the plaintiff in error duly excepted at the time:

"The court instructs the jury that when a man delivers "personal property to another man, under a contract which "provides that the person to whom such personal property "is turned over, is at liberty to deliver to the person so "turning over said personal property, other property of "like kind and equal in value, then the title to the property

"so delivered passes to the person so receiving said per-
"sonal property; and if the jury believe from the evidence,
"that the petitioner, Lewis Hatch, and the judgment
"debtor, Frank W. Hatch, entered into a contract which
"provided that the farm personalty on the Lewis Hatch
"farm should be delivered by Lewis Hatch to Frank W.
"Hatch, and that such contract further provided that Frank
"W. Hatch need not return to Lewis Hatch the same spe-
"cific articles of property, but that Frank W. Hatch was at
"liberty under said contract to deliver to said Lewis Hatch
"other personal property of like kind and equal in value to
"that to be delivered by the said Lewis Hatch to the said
"Frank W. Hatch, and you further believe from the evi-
"dence, that under said contract the farm personality on the
"Lewis Hatch farm was delivered by the said Lewis Hatch
"to the said Frank W. Hatch, and that said contract was in
"force between the said Lewis Hatch and the said Frank
"Frank W. Hatch at the time of the levy of the execution
"in the case of *Joseph G. Heim, Receiver of the First Na-
"tional Bank of South Bend, vs. Frank W. Hatch*, then you
"should find by your verdict that the property levied upon
"was the property of Frank W. Hatch, and liable to seizure
"under said execution." (Rec., pp. 107, 108.)

The court charged the jury that if you believe "from the evidence the arrangement between Lewis Hatch and Frank W. Hatch under which the farm was operated and carried on, was substantially as has been testified to by the said Lewis Hatch and Frank W. Hatch, then the natural and reasonable construction of the arrangement * * * did not have the effect in law to vest the title of any of the property or the proceeds of the farm in Frank W. Hatch * * * and you are instructed,

if you believe the arrangement and agreement between the parties in relation to the carrying on of the farm was in accordance with the testimony of the said Lewis Hatch on this point, then you should find a verdict in favor of the said Lewis Hatch, the petitioner." (Rec., p. 104.)

The jury were further charged that "Any one circum-"stanced as was Lewis Hatch at the time the arrangement "was made, about which he has testified in this case, had "the right to make such an arrangement as he has testified "to in the evidence in this case with a son, or with any one "whom he should choose, and that such right is an import-"ant right, which is not inconsistent with any principle of "public policy, and which is not forbidden by any precept "of the law, and the court charges the jury that even if "Lewis Hatch had gone away instead of remaining upon "the farm exercising some share of control that he would "have the right, upon returning, to assert title to the unsold "property remaining upon the farm, whether the same con-"sisted of the increase in the property or of the other "property bought to supply the place of that which was "there when he put his son or other party in control." (Rec., pp. 104-105.)

The jury were charged that "It was not necessary "that Lewis Hatch, in order to protect his "rights in this property, should assert dominion or "in any way interfere with the visible possession and con-"trol of Frank W. Hatch. The relations between them "as shown by the evidence in this cause, was not that of "landlord and tenant, but was more like that of master and "servant; that the possession of the son, Frank W. Hatch, "being necessary to the performance of the service con-"templated by the arrangement between them, and such

"possession being determinable at any time at the will of "either party, the relation between them was not a tenan- "cy, but the possession of Frank W. Hatch was the pos- "session of a servant; that the possession of Frank W. "Hatch, both of the farm and also of the farm products and "other property, as well as the implements and live stock "brought upon the place in pursuance of the arrangement, "as part of the farm equipment, was the possession of the "father, and that consequently the title to the property and "the possession thereof both remained at all times in Lewis "Hatch." (Rec., p. 104.)

And then the jury were instructed that:

"In considering the testimony in the case, the evidence "afforded by the tax schedules should be regarded with "caution, and the same should be considered as not neces- "sarily contradicting or impeaching the other testimony "concerning the relation and agreements existing between "Lewis Hatch and Frank W. Hatch. The informalities "usually attending the making of such papers, the incom- "pleteness of the schedules in evidence, and especially the "fact that it was the duty of Frank W. Hatch to pay the "taxes under the arrangement shown to exist between him- "self and his father, should all be taken into consideration. "(Rec., p. 105.)

To each of these instructions the respondent reserved his exception at the time.

ARGUMENT.

In the progress of this litigation three different relationships have been suggested as properly designating the attitude of the Messrs. Hatch toward each other in connection with this farm and personality, viz.: bailor and bailee, *landlord and tenant* and master and servant. The Court of Appeals, in reversing the first judgment, which was in favor of the levy, said: "The natural and reasonable construction of the arrangement is a bailment." * * * *Hatch vs. Heim*, 86 Federal Reporter, 436. On the second trial in the court below, the defendant in error abandoned this theory, however, and sought to establish that Lewis Hatch and Frank W. Hatch were *master and servant*, respectively. The contest in support of the execution levy has been prosecuted on the theory that under the contract made by these two men, *Lewis Hatch was the landlord and Frank W. Hatch the tenant*, the holding being a *tenancy at will*.

To sustain the proposition that the son was the *servant* of his father the defendant in error must establish that under this contract the control of the farm and personalty was *reserved* to the *father*. This may well be said to be the main point of the whole inquiry. Now what was the understanding of these two men of the provisions of this contract as shown by their statements of its terms and by their conduct under it throughout the fourteen years of its existence? Does it appear that the *dominion* and right to make the *final direction* was reserved to Lewis Hatch, and that Frank was there simply as his servant, *subject at all times to his absolute direction*, as to what

should be done with the property, what should be sold, what should not be sold, when and how the fences should be repaired, the soil manured, the ground plowed, the corn husked, the hay cut, the sheep sheared, etc., etc.? Can it be fairly said that such a condition in this contract was contemplated by either of the parties?

What is a *servant?* Let us consult a few high authorities on this subject.

"A servant is one who, for a consideration, agrees *to* "*work subject to the orders of another.*"

MacDonell on Master and Servant, 34.

"In strictness a servant is one who, for a valuable con- "sideration, engages in the *service* of another *and under-* "*takes to observe* his *directions* in some lawful business."

Cooley on Torts, 531.

"Where a person in the *employment* of another who in "the discharge of his duties is *subject* to the *immediate* "*direction and control* of his *employer*, he is properly "described as a *servant.*"

25 Ohio, 162.

Now what is a *master?*

"He is to be deemed the *master*, who has the *supreme* "*choice, control* and *direction* of the *servant* and whose will "the servant represents, not merely in the *ultimate result* "*of his work* but in all his *details.*"

Sherman & Redfield on Negligence, Sec. 160.

"He (the master) must hvae had the right to direct the

"action of the servant and to *accept or reject* its rendition by "him."

Paint & Color Co. vs. Conlon, 92 Mo., 221.

But the Connecticut judge seems to have been the most fortunate in his definition of this relation.

"To get at the truth we must look further and see if "the person said to be the servant *is acting at the time for* "*and in the place of the master*, in accordance with the *mas*-"*ter's will* and *not his own*."

Corbin vs. American Mills, 25 Conn., 274.

Do not these authorities effectually dispose of this master and servant claim?

What was the contract? The father's offer in substance was:

"Here is this farm of 700 acres; it is in good repair and "well stocked; I am getting old and want to get rid of this "burden so I can get away. (Rec., p. 30.) Now, my son, "if you will come here and take this farm and run it and "keep it up, making all repairs, paying all taxes on both "the realty and personalty, you can have what you can "make out of it. It is agreed, however, that if either of us "want to terminate the arrangement you must give the "farm up to me as it now is. If you have not got *the same* "*identical articles of personal property now on the farm* "you are to *substitute them with other ones*."

This offer the son accepted end the contract thus made was in force on that farm when the execution was levied.

Now is it not true that the purpose and effect of the contract was to put a new *Master* on that farm? The under-

signed believes that this is the first case on record in the reported decision of courts wherein a man who has run a business, who has had the sole enjoyment of the profits, who has, single handed and alone, been liable for and had to bear, all losses incident to the conduct of the business, has been declared to sustain the relation of *servant* to some other man *with respect to that particular business.*

If it was understood that the father was to have the *master's* right to control the son absolutely, in the operation of the farm, what was the purpose of contracting in advance that the son's liability was to make repairs and keep up the stock? And is not such a stipulation totally inconsistent with the master and servant relation?

If the father had this control it was a mere superfluity to exact from the son a *contract* to do these things, because *having the right of control* the father could from day to day and month to month and year to year have given his own orders to his son and enforced obedience to his will.

If the father was in reality *master*, can it be conceived that he would have exacted from his servant a contract giving him, the *master*, *permission* to take from the farm produce for domestic consumption? And this is precisely what the parties did. (Rec., p. 52.)

Is it not perfectly plain that the spirit and purpose of this contract *was to put a new master on that farm*, one who would enable the father to rid himself of the cares and responsibilities of the farm, and that henceforth the business of that farm *was the business of Frank W. Hatch?* Most certainly it *was not the business of Lewis Hatch.*

Are not the undisputed terms of the contract conclusive that Lewis Hatch intended to part with the entire "say" and control of the farm and chattels, and that both parties understood *that Frank was succeeding* to the *entire "say" and control of the farm and chattels*, even *as all admitted* he did succeed to the *entire burden* and *responsibility* of the farm?

Was not the property placed in the son's hands to use in the business of running that farm *for his own exclusive benefit*, and was not the only thing the father got under this contract his son's *legal obligatian to turn back to his father the farm stocked and equipped as when he took charge?*

In the Spring of 1897 the son sold to his father (the so called master) for $1,000 a quantity a wool sheared from the backs of the sheep taken in the levy. According to the theory of defendant in error *he thus figured in the rather droll attitude of purchasing his own wool.* (Rec., pp. 36-39.)

The son purchased *at his own expense* a drove of heifers, from whom were derived the milch cows and young stock included in the levy. (Rec., p. 46.) This would seem to hardly consist with the theory that he was a mere servant and that this live stock thus purchased with his own means in reality belonged to somebody else.

Before the levy the son put in bids, *in his own name*, for contracts to supply the butter factory with fuel to run the engine. (Rec., p. 57.)

After the levy he put in these bids in his father's name. (Rec., p. 57.)

The defendant in error took from the farm 150 or 200 sheep, *but subsequently brought back to the farm the same*

number he had taken away. This is the sheep transaction as related by the son:

"Q. *Did he bring back 150 or 200 sheep and put them "back in that flock that you were responsible to keep up?* A. "*I think he did.*

"Do you know whether he did or not? A. I know "that he brought about that number back, *about the num-"ber he took away.*

"Q. For that purpose? A. I don't say for what pur-"pose; I don't know. (Rec., p. 72.)

Is the son to be taken seriously when he says *he did not know for what purpose his father brought this lot of sheep onto the farm?*

Lewis Hatch sold stock off of the farm, *but always accounted to the son for the proceeds.* (Rec., pp. 80 and 84.)

Lewis Hatch several times paid the taxes, but was always careful to see that *he got the amount out of the son.*

Lewis Hatch *purchased from the son the wool referred to, produced on this farm,* and gave him therefor $1,000.

And on June 15, 1897, Lewis Hatch made out a schedule of his personal property for taxation in the school district where this farm is located and in this schedule *he did not include one article of farm personalty.*

If he had been the *master*, would he have had to contract in advance that his servant should permit his master *to have produce from the garden?*

If he had owned the property *would he have left it out of his tax return?*

If he had been the master would he have been overruled

by his servant in the matter of the plowing of the field? (For this valuable bit of testimony by one of the farm hands, see Rec., p. 91.)

If he had been the master would his servant have *replaced the farm implements and purchased the drove of heifers at his own expense?*

If he had been the *master* would he have constantly accounted to his *servant for moneys received for the produce of the farm?*

If he had been the *master* would he have been obliged to put back on the farm *the same number of sheep he had shipped up to Dakota?*

If Frank had been the servant what concern of his would it have been that his father shipped 150 head of sheep from the farm?

If Frank had been the servant would his father have given him *$1,000 for wool which his father already owned?*

If Frank had been the *servant would he have kept up the farm machinery at his own expense?*

If Frank had been the *servant* would he have *overruled his master's orders* as to the plowing of the fields?

If Frank had been the *servant* would he have spent *his own* money *making the farm better?* (Rec., p. 55.)

If he had been the servant, *being a truthful man and a graduate of a law school*, would he have told the marshal that he was a *tenant of the farm?*

If he had been the *servant* would he have returned all this property for taxation *as his own?*

The manifest inconsistencies and absurdities of this master and servant proposition, in view of the contract of the parties and their conduct toward the property during all these years, it is respectfully submitted, demonstrate absolutely the impropriety of he court's instructions.

If the plaintiff in error was not entitled to have the court grant his motion to direct a verdict at the close of petitioner's evidence and renewed at the close of all the evidence *he certainly was entitled to have the court give to the jury the instruction requested by him in writing.* (Rec., pp. 107-108.) Manifestly the most favorable view that can be taken of this case from the standpoint of the defendant in error is that "*there was an issue of fact to be determined;*" and still the court not only instructed the jury that if they believed that the father and son told the truth about the contract, their verdict must be in favor of the defendant in error, but the court refused to give this manifestly proper instruction requested by the plaintiff in error, based on the theory that "*Frank could discharge his legal obligation to his father by turning over to his father, at the termination of the arrangement, personal* property *like in kind and amount to that on the farm at the beginning of the arrangement.*" If there was evidence *tending to prove* that Frank could have done this, this refused instruction *should have been given*, if, indeed, the court should not have allowed motion of plaintiff in error to direct a verdict in his favor. The undersigned begs to respectfully submit that this motion should have been granted.

The attention of the court is invited to the following textbook observations on the subject of who is a tenant:

"The relation of landlord and tenant subsists by virtue of

"a contract expressed or implied between two or more per-
"sons for the possession of land or tenements in considera-
"tion of a certain rent paid therefor. * * * *But a*
"stated rent is not essential to the contract; because from favor,
"or for a consideration passing to the lessor at the time of
"its conception, *a lease beneficial in its nature to the lessee,*
"may be made without any reservation of rent."

Taylor's Landlord and Tenant, p. 10, 7 Ed.

The consideration passing to Lewis Hatch under this contract *was Frank's agreement to keep up the farm*—realty and personalty.

"The law will, in general, *imply the existence of*
"a tenancy wherever there is an ownership of land on the
"one hand *and an occuption by permission on the other:* for
"in such cases it would be presumed that the occupant
"intended to pay for the use of the premises. * * *
"As a general rule it may be stated that the mere occupa-
"tion of land, with the owner's concurrence, will enure as a
"tenancy from year to year, or at will, according to the
"circumstances determinable at the pleasure of the owner."

Taylor's Landlord and Tenant, 7th Ed., p. 15.

"*A contract to pay rent is not essential in order to create*
"the relation (of landlord and tenant), although this is the
"usual incident of a tenancy. It is competent for a person
"to permit another to occupy his premises *gratis*, if he
"chooses to do so, and if the person enters into possession
"under such permission, *the fact that no rent was to be paid,*
"or that no term was agreed upon, does not divest them of
"the relation of landlord and tenant."

Wood's Landlord and Tenant, 2nd Ed., p 3.

It would seem that these learned authors, when the quoted observations were indited, must have had in mind just such a contract as that enteerd into between the Messrs. Hatch.

But aside from the question of the execution debtor's relation to the *realty*, the undersigned begs to recall a familiar rule which, in his judgment, clearly determines that the title to this personalty was in *Frank* W. Hatch at the time of the levy. That rule is, that when one man turns over personal property to another man under an arrangement by which that other man is not obliged to restore the *same specific* articles of property, but is at liberty to deliver *other* property of the same kind and value as that received, *the receiver becomes the owner of the property.*

Story on Bailments, Section 439.

Lonergan vs. Stewart, 55 Ill., 49.

Newmark's Law of Sales, Sec. 14; pp. 17. 18.

Schouler's Bailments and Carriers. 2 Ed., Sec. 6.

In such a case the law considers the transaction a *sale*. Mr. Benjamin has defined the position of the parties in such a case, as follows:

"One established test between a bailment and a sale is "that when the identical thing delivered is to be returned, "though perhaps in an altered form, it is a bailment, and "the title is not changed; but when there is no obligation "to return the specific article received, and the receiver is "at liberty to return *another thing*, either in the same or "some other form, * * * *he becomes a purchaser: the "title is changed; the transaction is a sale:* and the property

"is at the receiver's risk; * * * *This is more evidently "true when there is an express right in the receiver to con-"sume, dispose of or sell the article received.*"

Benjamin on Sales, 6th Edition—Bennett's, p. 5.

And to the same effect see *Good vs. Winslow*, 4 Allen, N. B., 241, in which the lessee of cattle agreed to return them in two years, "*or others in their stead.*"

The above observation of Mr. Benjamin appears to be particularly applicable to the case under consideration. Bearing in mind the purpose of the contract, the nature of the property and the object for which it was used, the execution debtor had not merely a *right* to "dispose of or sell the articles received," but the success of his business of running the farm made it absolutely necessary that he should be continually "*turning the property over.*" Thus it appears that neither of the parties to this contract could possibly have contemplated that when the arrangement terminated (if at all) the son would have on the farm the identical live stock, grain and implements received from his father. That was an impossibility.

In a Pennsylvania case the effect of such contracts as the one entered into between the execution debtor and the defendant in error was so clearly explained to the jury by the lower court that the undersigned begs the privilege of quoting the following from the charge of Judge BAER—it being a case of a levy by a judgment creditor of one Neuman, a miller, on flour at the mill. The plaintiffs claimed the property, alleging it was the product of wheat delivered by them to Neuman as *bailee*. The jury were

instructed that "it has been said that when the identical "thing delivered is to be returned, though in an altered "form, such contract is one of bailment. To illustrate: "When John Jones takes a bag of wheat to the mill to be "ground into flour, the transaction is one of bailment. He "expects to get the flour from that bag of wheat and he "continues to be the owner of the wheat or its product. If "it be destroyed by the burning of the mill, it is his loss, "and not the miller's; or if the sheriff comes with an execu- "tion to levy upon it as the property of the "miller, he cannot sell it. But where there is no "obligation to return the *specific article*, but the "receiver is at liberty to return *another thing, the transaction "is a sale*, and not a bailment. As when John Jones de- "livers twenty bushels of wheat to a miller and agrees to "take from him at some other time twenty bushels of other "wheat in return, this transaction is not a bailment, but a "sale, and the property passes to the miller, and in case the "mill should burn, the loss would be his, *and an execution "creditor could levy upon it as the miller's property*."

At page 603, 117 Pa. State, in the same case, the Supreme Court say: "The miller was under no obligation "to restore to plaintiffs the specific or identical wheat "which he received, nor the product of it in flour; indeed, "this, owing to the manner in which the business was con- "ducted, was practically impossible. The fundamental dis- "tinction between a bailment and a sale is that in the former "the subject of the contract, though in an altered form, is "to be returned to the owner; whilst in the latter there is "no obligation to restore the specific article; the party is at "liberty to return some other thing of equal value in place "of it. In one case the *title* is not changed, and in the

"other *it is*, the parties standing in the relation of *debtor* and "*creditor*."

Butz vs. Diehle, 117 Pa. State, 589-603.

And so in *Smith et al. vs. Clark*, 21 Wend., 83, the plaintiffs made an agreement to deliver wheat to one Hubbard at his flour mill, and Hubbard agreed that for every four bushels and fifty-five pounds of wheat he would deliver to the plaintiffs a barrel of flour. After plaintiffs delivered to Hubbard some two thousand bushels of wheat and Hubbard had delivered to plaintiffs only about half of the flour coming to them, Hubbard sold and delivered to Clark, the defendant, seventy-five barrels of flour ground from the wheat received from the plaintiffs and from other parties. The plaintiffs replevined the property. In its decision the court say (page 84): "The contract between "plaintiff and Hubbard was in effect one of *sale* and not of "bailment. The property in the wheat passed from the "plaintiffs at the time it was delivered at the mill and Hub-"berd became a debtor and was obliged to pay for the "grain in flour. There was no agreement or understand-"ing that * * * the identical wheat should be re-"turned in the form of flour. Jones on Bailments (2nd "Ed.), 102. A different doctrine was laid down in *Seymore* "*vs. Brown*, 19 Johns. R., 44, but the authority of that case "has often been questioned; 2 Kent, 590; Story on Bail-"ments, 193, 194, 285; *Buffum vs. Merry*, 3 Mass., 478; "and the decision was virtually overruled in *Hurd vs. West*, "7 Cowen, 752, and see page 756, note; the case of "*Slaughter vs. Green*, First Rand (Va.) R., 3, is much like "*Seymore vs. Brown*. They were both hard cases and "have made bad precedents."

In *Johnston vs. Brown*, 37 Iowa, 200, plaintiff sued de-

fendant in attachment, and the writ was levied on grain in warehouse at Toledo. This grain was left with the defendant by the intervenor, Bickett, with the understanding that when Bickett got ready to sell it Brown would give the highest market price or the same amount of wheat of like grade and quality. The court say (page 203): "The "authorities almost uniformly hold that a transaction such "as this is constitutes a sale and not a bailment." Citing

Chase vs. Washburn, 1 Ohio State, 244.
Woodward vs. Seemans, 125 Ind., 330.
Smith vs. Clark, 21 Wend., 84.
Wilson vs. Cooper et al., 10 Iowa, 565.
Ewing vs. French, 1 Blackf. (Ind.), 354.

Norton vs. Woodruff, 2 Coms., 155, in this case the court say:

"The distinction between an obligation to restore the "specific thing received, or to return others of equal value, "is the distinction between a bailment and a sale."

When the same identical article is to be returned, or is to be returned in an altered form, that constitutes a bailment, and the title to the thing remains in the bailor. If, however, there is no obligation on the receiver to restore the specific thing and he is at liberty to return a different article of equal value then it constitutes a sale, and the property is transferred by the delivery. The receiver acquires an absolute title thereto.

2 Kent Com., 590.
Jones on Bailments, 105-106.
Buffum vs. Merry, 3 Mass., 478
Butterefild vs. Lathrop, 71 Pa., 225.

It is not desired to submerge the court with authorities,

but the undersigned respectfully suggests that the following citation is of peculiar interest in this connection:

"In the present case the stipulation in the lease is to re-
"turn at the end of five years *cows of equal age and quality*,
"which necessarily *excludes the idea* that the *identical cows*
"*put on by landlord* were to be returned to him at the *expi-*
"*ration of the term*. For those cows could not be o equal
"age, although they might possibly be of equal value.
"* * * In relation to goods thus let with the farm
"* * * *they are the goods of the tenant, and may be*
"*attached and sold for the payment of his debts*. * * *
"It is unquestionably competent for the landlord in cases
"of this description to make a contract which will secure to
"him an equitable lien upon the property put upon the
"farm for the use of the tenant, or on the products thereof.
"By applying the well established principles of law. * * *
"*I am bound to decide that the legal title to the cows and*
"*sheep brought onto the farm at the commencement of the*
term "~~farm~~, *passed to the tenant*, so as to give him the right to
"dispose of them and *to subject them to seizure and sale for*
"*his debts*."

Carpenter vs. Griffin, 9 Paige, 314.

Your Honors will observe that in this last mentioned case the execution was contained, not because there was a *written* lease, but because the contract provided the tenant was under obligation "to restore *an equal number of cows* "*and sheep* of the *same age* as those leased with the farm at "the time the tenancy commenced."

In view of the foregoing it is respectfully submitted that the effect of the contract between the Messrs. Hatch (entered into fifteen years prior to the levy), was to transfer to the son the title to the stock and other farm personalty then

on the farm; that the son was thereby clothed with full power to deal with the property as his own; that as the father thereby lost the title to the property, he obtained the obligation of his son to have on that farm, on the father's demand, personal property, *equal in kind and amount* to that received from the father at the beginning of the tenancy; that during the fifteen years the tenancy subsisted the son run the business as his own, had the sole enjoyment of the benefits and discharged all the liabilities; he kept up the farm personalty; practically *nothing was levied upon that was on the farm fifteen years before;* had disease gotten among the stock and carried them off the loss would have been on the son. Under the contract the father had a valid, subsisting legal right to demand and receive from the son sock and other personalty, equal in amount and kind to that on the farm at the beginning. Whenever stock or produce was sold, the revenue went to the son. Whatever expenses there were came out of his pocket. If crops were poor it was his loss, and if they were good it was his gain—and his alone. The son had the sole right to sell. If the father disposed of anything he had to account to his son. In view of these facts, is it not perfectly manifest that the son was the absolute owner of the property, and that the *master and servant* relation could not possibly exist.

As was said by Mr. Kent, "*the power of alienation is a necessary incident to the right of property*" and it would therefore seem that in such a controversy as the one at bar if we can find the man possessing this power we will have located the owner of the property. And certainly the defendant in error did *not* have this power of alienation.

Suppose that Arnold, instead of being a United States Marshal with an execution for the property of *Frank* W Hatch, had been a neighbor of *Frank* W. Hatch desirous of purchasing for his own farm, implements, live-stock, and grain of the amount and kind involved in this controversy. And suppose, that instead of taking this property under this execution, neighbor Arnold had said "I will give you $4,500 for this property," and *Frank* W. Hatch had accepted the offer and took the money and turned over the property. And suppose then *Lewis* Hatch said to his son "I have decided to take back the farm; give it to me, with the same amount and kind of grain, implements, and live-stock as was on the farm at the beginning of our arrangement," and suppose that thereupon *Frank* W. Hatch had gone to neighbor Heminway and from him purchased grain, implements, and live-stock of the requisite number and kind, and took them to the farm of his father and tendered them to his father in discharge of his obligation under his contract, is it not perfectly clear that thereby his father would get precisely what his contract stipulated he should have? Would it not be a full discharge of the son's obligation in its strict letter, and is it not equally plain that neighbor Arnold would become the owner of the property as the successor to the title of *Frank* W. Hatch, and is it not also clear that the deal between neighbor Arnold and *Frank* W. Hatch was a transaction in which *Lewis* Hatch had absolutely no interest or concern whatever?

Or suppose the farm hand, Jones, while driving the reaper, had been thrown to the ground and injured by reason of defective machinery, and thereupon (preferring a judgment against *Lewis* Hatch to one against *Frank* W.

Hatch) suppose this farm hand sued the father *designating him as the master*, and suppose at the trial of this action *Lewis* Hatch should come into court and say "I am not responsible to this man" and then testify in terms to the contract in evidence here, *is it not perfectly plain that the farm hand's case would never get to the jury?*

The undrsigned erespectfully submits that in view of the foregoing, the judgment must be reversed.

KENESAW M. LANDIS,
Attorney for Plaintiff in Error.

No. 183.

Office Supreme Court U. S.
FILED
MAR 15 1900
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

No. 183.

JOHN W. ARNOLD, PLAINTIFF IN ERROR,

vs.

LEWIS HATCH, DEFENDANT IN ERROR.

AUTHORITIES CITED BY PLAINTIFF IN ERROR.

The Supreme Court will allow plaintiff in error to show jurisdictional amount by affidavit filed in this court.

Dean Richmond *vs.* City of Milwaukee, 21 Howard, 391.
Street *vs.* Ferry, 119 U. S., 385.
Williamson *vs.* Kincaid, 4 Dallas, 20.
Course *vs.* Stead, 4 Dallas, 22–25.
The Grace Girdler, 6 Wallace, 441.

KENESAW M. LANDIS,
Counsel for Plaintiff in Error.

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No. 183.

JOHN W. ARNOLD, PLAINTIFF IN ERROR,

vs.

LEWIS HATCH.

Opinion in Hatch vs. Heim, 58 U. S. App., 544.

HATCH *vs.* HEIM. } No. 471.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DIVISION OF THE NORTHERN DISTRICT OF ILLINOIS.

Argued February 19, 1898; decided April 16, 1898.

Before Woods, Jenkins, and Showalter, circuit judges.

The opinion states the case.

Mr. George A. Dupuy (Mr. E. H. Gary was with him on the brief) for plaintiff in error.

Mr. Kenesaw M. Landis for defendant in error.

WOODS, circuit judge, delivered the opinion of the court:

The plaintiff in error, Lewis Hatch, filed in the court

below his petition, entitled "Joseph G. Heim, receiver, etc., *vs.* Frank W. Hatch," averring, in substance, that he was the sole and absolute owner of certain personal property, consisting of live stock, farming implements, and farm products; that on Saturday, August 21, 1897, the property described was levied upon by virtue of an execution dated August 13, 1897, and issued out of that court "to enforce the collection of a judgment for four thousand dollars debt and three hundred fifty-one and nine-hundredths dollars damages and costs, entered on July 20, A. D. 1897, in favor of said above-named plaintiff and against the above-named defendant, Frank W. Hatch, in the above-entitled proceeding," and that the property had been wrongfully levied upon and taken from his possession.

It does not appear in the record, but was assumed at the hearing and in the briefs, that Heim was the receiver of a national bank, and that for that reason the case was one of which the district court had jurisdiction. No answer or plea to the petition was filed, but a jury was empaneled and sworn to try "the issue joined," and after hearing the evidence and the charge of the court returned a verdict finding the issues for the receiver, and that the property levied upon was the property of Frank W. Hatch when the levy was made. Various errors are insisted upon. Those predicated of the rulings of the court in admitting and excluding evidence do not seem to merit special consideration. If material error was committed it is to be found in the court's charge to the jury.

The essential facts of the case are that in 1883 Lewis Hatch, being the owner of a large and well-stocked farm, on which he then had and has ever since maintained his home, entered into an agreement with his son, Frank W., then just out of school, whereby the latter was to take the control and management of the farm and implements of husbandry and of the live stock thereon, maintain repairs, pay taxes, replace stock disposed of, and have as his own the net pro-

ceeds, each party being at liberty to terminate the arrangement at any time. The testimony of the father and the son to that effect is harmonious, and was not materially affected, so far as we perceive, by other testimony or by the proof of other facts, such as their returns of property for taxation and the disposition made by them of wool which had not been levied upon. The court in its charge stated the arrangement as follows: "Mr. Lewis Hatch was then approaching his seventieth year, according to the testimony, and desired to retire from active work. He said to his son, 'Now, here is the farm' (in effect. I am not attempting to quote the language, but in effect). 'Now, here is this farm of some seven hundred acres, and here is all of this stock, farming implements, and property on the farm. I want you to take it. I want you to do well by it. You shall receive all of the income or revenue which is derived out of it; in other words, all the benefits which accrued from the use of the farming property, subject, however, to the payment of all taxes, to the keeping up of repairs, and that the property itself, both farm and personal property, shall be kept up, so that at the termination, whenever that shall be, there shall be left here as much of personal property, stock, etc., as I turn over to you.'" The farm was conducted under this arrangement, the son living with the father, until 1886 or 1887, when, having married, Frank removed to Texas, but after some months returned at the request of his father and resumed control upon the same terms and conditions as before, except that he lived in a separate house built on the farm for his use. In November, 1892, he went away again, going to the State of Washington, where he incurred the liability for which the judgment was taken, for the satisfaction of which the property in question was seized on execution; but whether in that instance there was a complete and intended abandonment of the farm and property thereon, as when he went to

Texas, is not clear, but in the view we take of the case the question is not important.

The natural and reasonable construction of the arrangement, in our judgment, is a bailment which did not vest the title of any of the property or of the proceeds of the farm in Frank W. Hatch, though while the arrangement lasted he had power to sell to others without further authority from his father. Certainly the jury would have been justified in so finding if, indeed, the court ought not to have so instructed; and this being the arrangement, it was not necessary that Lewis Hatch, in order to protect his rights in the property, should assert dominion or in any way interfere with Frank's visible possession and control. The relation between them was not that of landlord and tenant, but was more like that of master and servant. The father, desiring his farm cared for and kept up and at the same time wishing to afford an opportunity to his son, employed him to take the control and management, as stated, and the possession given the son, being necessary to the performance of the service contemplated and determinable at any time at the will of either party, was not a tenancy, but the possession of a servant. (See cases cited in Chatard *vs.* O'Donovan, 80 Indiana, 20.) The son's possession of the farm and also of the products thereof and of other property was the possession of the father. The same is true also of property, implements, or live stock bought and brought on the place in pursuance of the agreement as a part of the farm equipment. It follows that the proposition, for which Story on Bailments (9th ed.), sec. 439, and Lonergan *vs.* Stewart, 55 Illinois, 44, are cited, that when one man turns over personal property to another under an arrangement by which the latter is not obliged to return the specific articles, but may deliver other property of like kind and value, the receiver becomes the owner of the property delivered to him, is not applicable, and the court erred when, after stating the arrangement, it proceeded

to say to the jury: "Now, then, that is their story of the arrangement. In that there is no word of suggestion by Lewis Hatch that he reserves a control as to how he was to conduct it (the farm), as to whom he would sell this or that produce from the farm, or this or that piece of stock—no suggestion of that is in the agreement as stated. Look over the conduct of the parties subsequently and see if you can find from that any such understanding." This is objectionable because it implies what was afterward distinctly affirmed in the charge, that if Lewis Hatch did not "retain the absolute dominion and control over all that property * * * the effect of the arrangement was to put the title of the property in Frank W. Hatch." This error was emphasized by other equivalent expressions in the charge, and especially by the statement that "no man has the right to put into the absolute control and possession of another personal property for a long period of time, in the State of Illinois, for the period of five years or more, without taking the consequences which accrue therefrom, namely, that the title must be presumed to be in the person to whom it was given over, if the control is an absolute control. * * * It requires a clear showing of a paramount control in Lewis Hatch—that is, a right to say what shall be done with reference to all this personal property or any of it. Unless that was retained by him, the title passed." The possession for five years which under the Illinois statute (2 Starr & Curtis' Annotated Statutes (1896), c. 59, sec. 7) establishes title is an exclusive and undivided possession, and does not apply, and evidently was not intended to apply, to a case like this, where the possession amounting only to custody is held for the benefit of the owner under circumstances which in no way suggest or could be promotive of fraud. The right of any one circumstanced as was Lewis Hatch to make such an arrangement with a son or with any other whom he should choose is an important right, inconsistent with no principle of public policy and forbidden by no precept of the

law, and if, instead of remaining upon the farm and exercising some measure of control, he had gone away, his right upon returning to assert title to the unsold property remaining upon the farm, whether the increase or bought to supply the place of that which was there when he put his son in control, would not be less clear.

The charge of the court seems also to be subject to the objection urged that the jury was not told that in respect to matters of fact the suggestions of the court were advisory only, and that the jury must finally exercise an independent judgment.

The judgment below is reversed, with instructions to grant a new trial.